Supreme Court, U.S.
FILED

982003 JUN 14 1999

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

DENNIS HOFFMAN and DANIEL LEE WILSON
Petitioners

v.

KENDALL BALLEW, sheriff of LeFlore County; HENRY WELLS and RICHARD ENTMEIRER, duly appointed and acting deputy sheriffs of LeFlore County; TOMMY CALDWELL, a reserve officer of LeFlore County sheriff's office; PAT BOZARTH, day jailer of LeFlore County jail; JIM SHINAULT, night jailer of LeFlore County jail; and BOARD OF COUNTY COMMISSIONERS, Leflore County, Oklahoma

Respondents

On Petition For Writ Of Certiorari To The Supreme Court of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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18pp

QUESTION PRESENTED

In Oklahoma the state trial judge, in addition to his judiciary function, is directed by statute to promulgate, along with the State Department of Health, the rules and regulations of county jails in Oklahoma. The petitioners herein brought three separate lawsuits involving the rules and regulations of the LeFlore County, Oklahoma, jail. The petitioners asked the judge to disqualify as the trial judge on the grounds the the judge sitting as a judicial officer should not be permitted to sit as a trial judge on a case where there is drawn in question the validity or non-validity of the rules and regulations which the judge had enacted in his capacity as a ministerial officer.

The question thus presented is:

In a case involving the application and interpretation of rules and regulations of a county jail which were promulgated by a state court district judge in his capacity as a ministerial officer, does the due process clause of the Fourteenth Amendment disqualify such judge from serving as the trial judge in lawsuits brought against the county sheriff, his deputies and the county for beatings received in the county jail?

EXPLANATION AS TO PARTIES

In keeping with customary Oklahoma procedure dealing with disqualification of judges this matter was presented to the Supreme Court of Oklahoma in a case styled: DENNIS HOFFMAN and DANIEL LEE WILSON, petitioners: v HON. GEORGE H. McBEE, District Judge of LeFlore County, Oklahoma, respondent; Case No. 92582. The Oklahoma Supreme Court in its order of March 22, 1999, (A1) reflected the case as thus styled. With a view toward making the real parties in interest respondents as opposed to the district judge, the style of the case utilized in the Supreme Court of Oklahoma is abandoned.

The cover page of this Petition for Certiorari correctly reflects under "respondents", all defendants in the three cases before the trial court presently remaining and are the real parties in interest in the present proceeding. Some of the named respondents are involved in only one case of the three, some in all three. Those identified in the cases below as "six other unknown and unnamed deputies" or "four unnamed policemen" or "one unknown officer of the Oklahoma Highway Patrol" were not served and have been abandoned as defendants in the lawsuits.

All of those named as respondents on the cover page of this petition are represented by the same counsel and service will be accomplished accordingly.

PETITION FOR A WRIT OF CERTIORARI

Plaintiffs state:

OPINION BELOW

There was no opinion as such by the Supreme Court of Oklahoma. The court entered an order denying the relief sought. The order is set forth in full in the appendix.

JURISDICTION

The order and judgment of the Supreme Court of Oklahoma was entered on March 22, 1999. This court's jurisdiction rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall****deprive any person of life, liberty or property without due process of law****

U.S. Const. Amend. XIV.

STATEMENT OF CASE

The State of Oklahoma is divided into a number of judicial districts. In rural counties the judicial district may encompass several counties. In the case we have here LeFlore County, Oklahoma, is combined with two adjoining counties to make one judicial district. The chief trial judge in each judicial district is known as the District Judge.

In addition to his duties as a judicial officer, the Oklahoma legislature has, by statute, bestowed upon the District Judge the ministerial duty of promulgating, along with the Department of Public Health, rules and regulations concerning the operation of county jails within Oklahoma. These statutes are found in the appendix having been excerpted from petitioner's brief before the Oklahoma Supreme Court. The three underlying jail brutality cases which gave rise to this litigation all will require judicial resolution and interpretation of the rules and regulations pertaining to the county jails in LeFlore County, Oklahoma. It is

petitioners' position that the judge is disqualified from sitting as the trial judge when the trial is going to involve the application and interpretation of the rules and regulations that he either enacted or failed to enact while serving as a ministerial officer.

EVENTS GIVING RISE TO PETITIONERS' CLAIM

These events are simple and fairly straightforward. After the filing of the three lawsuits, petitioner's counsel kept waiting for the trial judge to certify his disqualifications or recusal. When such was not forthcoming, petitioners' counsel in keeping with the rules, visited with the court in camera and requested that the court disqualify in the cases. This the court refused to do and counsel took the next step of putting the request in writing. Once again the request was denied. Then, as provided by the rules, counsel asked the chief administrative judge for this area of Oklahoma to review the matter and no relief was forthcoming there. Still within the rules and within the five days allowed, counsel asked the Supreme Court of Oklahoma to assume original jurisdiction and issue a writ of mandamus on the disqualifying question. This resulted in the order of March 22, 1999, summarily denying relief. We are now before this court seeking a writ of certiorari trying to get the judge disqualified from hearing the cases.

STAGE AT WHICH FEDERAL QUESTION RAISED

In petitioners' brief in support of petition for writ of mandamus before the Oklahoma Supreme Court is found the following language:

"Patently, the respondent Judge should not be permitted to sit as a minister in the executive branch and then also sit as a judicial officer when the matter is presented, as here in these cases, for judicial review. To permit this state of things to come to pass would deprive the petitioners of due process of law under both the Fourteenth Amendment to the United State Constitution and Art. 2, 7, of the Constitution of the State of Oklahoma."

The order of March 22, 1999, did not, of course, mention this federal question.

REASON FOR GRANTING THE PETITION

When the Supreme Court of Oklahoma disposed of petitioners' application for a writ of mandamus seeking the disqualification of the trial

judge it decided an important federal question going to due process of law in a way that conflicts with relevant decisions of this court. The asserted error does not consist of erroneous factual findings or the misapplication of a properly stated rule of law. The case is postured as a straight up or down issue. On one hand we have two county jail detainees who suffered from the use of MACE and other punitive measures going to trial before the judge who under his own rules and regulations had allowed the MACE and other punitive measures to exist. This is an important federal question to these two petitioners. The granting of this petition will have a marked salutary effect on other state courts that might be prone to ignore the provisions of the Fourteenth Amendment in their treatment of their citizens.

ARGUMENT

The facts of the case serve as argument for the granting of this petition much more eloquently than anything we might say. As to the law, Mr. Justice Black told us over forty years ago that no man can be a judge in his own case. He spoke for the court *in re Murchison,* 349 US 133, 99 L Ed 942, 75 S Ct 623.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome....."

This petition should be granted.

RESPECTFULLY SUBMITTED,

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APPENDICES

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Order of March 22, 1999, from the Supreme Court of Oklahoma .....

APPENDIX B:

Excerpt from Application For Writ of Mandamus before the Supreme Court of Oklahoma showing Style and Case Number .....

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Excerpt from Petitioners' Brief before the Supreme Court of Oklahoma - Showing Factual Allegation of Lawsuits .....

APPENDIX E, E-2, E-3:

First Page of the Three Petitions in Trial Court Disclosing Style, Case Numbers and Identity of Defendants .....

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DENNIS HOFFMAN and DANIEL LEE WILSON, Petitioners, v. THE HONORABLE GEORGE H. McBEE, District Judge, LeFlore County, Oklahoma, Respondent.	)	FILED SUPREME COURT STATE OF OKLAHOMA MAR 22 1999 JAMES W. PATTERSON CLERK No. 92,582

ORDER

Original jurisdiction is assumed. Petition for writ of mandamus seeking to disqualify respondent judge, George H. McBee, in Cause No.s CJ-98-616, CJ-98-650 and CJ-98-679, all on the docket of the District Court, LeFlore County, is denied.

DONE BY THE ORDER OF THE SUPREME COURT IN CONFERENCE THIS 22nd DAY OF MARCH, 1999.

(S) HARDY SUMMERS
CHIEF JUSTICE

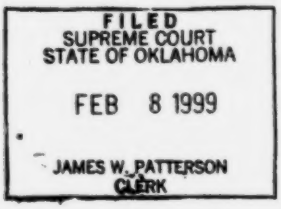
Summers, C.J., Hargrave, V.C.J., Hodges, Lavender, Simms, Wilson, Kauger, JJ, concur

Opala, J. dissents.

Watt, J., concurs in part, dissents in part.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA



Dennis Hoffman
and
Daniel Lee Wilson

Petitioners

v

No. 92582

The Hon. George H. McBee,
District Judge, LeFlore County,
Oklahoma

Respondent

APPLICATION TO ASSUME
ORIGINAL JURISDICTION AND
PETITION FOR WRIT OF MANDAMUS

I.

This is an original action wherein the petitioners request that this Court issue a Writ of Mandamus commanding the respondent judge to disqualify in their civil cases presently pending in the District Court of LeFlore County, Oklahoma. The petitioners have heretofore complied with all preliminary steps necessary for this Court to assume jurisdiction and hear the application. The petitioners in keeping.....

APPENDIX C

RELEVANT OKLAHOMA STATUTES

The Oklahoma Statutes governing County jails and the District Judges responsibilities concerning such jail are several: (Emphasis sup plied)

a. Title 57, O.S.A., Section 47, provides:

"The sheriff, or such person designated by law in his place, shall have charge of the county jail of his county and of all persons by law confined therein, and such sheriff or other officer is hereby required to conform, in all respects, to the rules and directions promulgated pursuant to Section 192 of Title 74 of the Oklahoma Statutes and of the ***district judge*** and communicated to him by the proper authority."

b. Title 57, O.S.A., Section 48, provides:

"The sheriff, or other officers performing the duties of sheriff of each county in this state shall procure at the expense of the county a suitable book or computer record that shall be considered the

original for all purposes, to be called the jail register, in which the said sheriff, by himself or his jailer, shall enter:

1. The name of each prisoner with the date and cause of committment, and the authority committing him; and, if committed for a criminal offense, a description of his prison;

2. The date and manner of his discharge or escape, as the case may be;

3. What sickness, if any, has prevailed in the jail during the year, and if known what were the causes of such disease;

4. The habits of the prisoners as to personal cleanliness, diet and order.

5. The means furnished prisoners of literary, moral and religious instruction, and of labor, and;

6. All other matters required by said rules, or in the discretion of such sheriff deemed proper; and the said sheriff, or other officers performing the duties of sheriff, shall carefully keep and preserve the said jailer register or computer record in the office of the jailer of his county, and at the expiration of such shall deliver the same to his successor in office."

To demonstrate the legislatures' intent that the District Judge has a continuing responsibility for all the provisions found in Section 48 (Jail Register), the legislature enacted a follow up statute:

Title 57, Section 49, provides:

"The sherriff shall furnish the District Court with a copy of the register of computer record upon request of the ***presiding judge of the district court.***

Title 57, Section 51, provides:
"It shall be the duty of the county commissioners, at the expense of their county, to provide suitable means for warming the county jail and its cells or apartments, beds and bedding and such

other permanent fixtures and to make such repairs as may be prescribed by the ***district judge*** or the State Department of Health. The commissioners shall also have power to appoint a medical officer to the jail and pay him such salary as they may think reasonable and proper, which shall be drawn out of the county treasury, and said medical officer or any physician or surgeon who may be employed in the jail shall make a report in writing whenever required by said commissioners, ***district judge*** or grand jury."

Title 57, Section 55, provides:

"If the sherriff or jailer in charge of any county jail shall neglect or refuse to comply with any of the rules and regulations established by the ***district judge,*** or pursuant to Section 192 of Title 74 of the Oklahoma Statutes or to any other duties required of him by Sections 41 through 64 of this title, he shall, on conviction hereof, by indictment for each case of such failure or neglect of duty as aforesaid, pay into the county treasury of the proper county, for the use of such county, a fine not less the Ten Dollars ($10.00) nor more than One Hundred Dollars ($100.00) to be assessed by the district court of the proper district."

APPENDIX D

The jail in LeFlore County is located on the top floor of the LeFlore County Courthouse in Poteau, Oklahoma. There is a jail elevator that runs up from the Sheriff's office to the fourth floor where the jail is located. When one steps off the elevator he immediately faces jail bars and a locked door. Once the jail door is opened one steps into a long broad passageway. To the left is the jail kitchen and a women's cell. To the right at the end of this passageway is a large jail cell containing many beds for general jail population. Directly across the passageway are two more secure cells each capable of housing some dozen or so prisoners. Across the passageway and directly adjacent to the secure cells is what is called the "stand-up cell." The sides and back of the "stand-up cell" are of solid steel but contain openings through which prisoners in the two secure cells may observe what is going on in the "stand-up cell." The door of the "stand-up cell" is made up of cell bars that open out into the passageway. The bars that make up the "stand-up cell" door are perhaps spaced some 6 to 8 inches apart. There is no water or restroom facilities in the "stand-up cell." It is approximately 60 inches in width and 30 inches deep. There is no bunk or place to sleep in the "stand-up cell." The average size prisoner cannot lie down on the steel

floor of the "stand-up cell" and stretch out because there is not enough room. Thus the name "stand-up cell."

In petitioner Hoffman's petition he sets out that on the evening of November 8, 1998, he was beaten and placed in the "stand-up cell." While in the "stand-up cell" he was requested to place his hands through the bars and was handcuffed. From the beginning he was repeatedly Maced. At the end of some 30 minutes the door to the cell was opened and as many officers that could get to him proceeded to beat him with flash lights and chains. Sometime after midnight he was bleeding so bad that someone decided he might bleed to death so he was taken to the hospital, sewed up, bandaged and brought back to the jail and placed once again in the "stand-up cell" where he remained until 3:00 a.m. on Tuesday, November 10, 1998. Under these conditions he spent a total of some 29-30 hours in the "stand-up cell." At one point in all this he needed to urinate and was told by the jailer "we will see about it." When Hoffman could hold his urine no longer the jailer came in and soaked Hoffman and the cell in Clorox bleach. It should be added that during the Mace period of all this the jailer would throw cold water in on Hoffman after the Mace. Water is contraindicated and heightens the pain and discomfort of Mace.

In petitioners Wilson's first petition he sets out that in early September, 1998, he was in a sleeper cell when about 5:00 p.m. a jailer ordered him out and was told he was to be taken to the office out of sight of the video camera and beaten. When Wilson refused to leave the cell the jailer called in four local policeman to help him. These officers, acting under the direction of the jailer, wrestled Wilson to the floor where Wilson was handcuffed and placed in leg irons. The jailer rendered Wilson helpless through the use of Mace. The Mace was so thick that other prisoners had to keep their heads next to the floor to breathe. One older man suffered a heart attack as the result of the Mace and was hospitalized for a week. Once Wilson was handcuffed and shackled and rendered helpless by the Mace he was kicked to the "stand-up cell" where two hours later another deputy came in and placed a waist chain on Wilson so he could not move his hands or arms. Thus blinded and hogtied Wilson remained in the "stand-up cell" until 7:00 a.m. the next morning. Another jailer had removed the leg irons and handcuffs when he came on duty at 1:00 a.m. Wilson sets out that the next day he requested medical attention. This was refused until his mother learned of the incident and came to the Courthouse protesting to the point that Wilson was taken and given medical treatment.

In Wilson's second action he sets out that on November 2, 1998, there had been a minor protest in the jail that morning because the prisoners refused to eat the gruel served for breakfast and demanded that someone in authority come up and see about the food situation because the prisoners were starving. The fact of the matter was that the trustee in charge of food was withholding food and selling it to those who could afford to buy it in the form of hamburgers, etc. If you had no money then you just went hungry. Wilson sets out that following this breakfast protest the jailer came to his cell and ordered Wilson out of the sleeper cell. The jailer had his glasses off and was carrying his flashlight. This was a bad sign and Wilson did not want to go. Help was called and Wilson was handcuffed and shackled and placed in the "stand-up cell." Wilson remained there until 3:00 p.m. when another jailer came on duty and released Wilson. During the seven hours he was in the "stand-up cell", handcuffed and shackled Wilson was repeatedly Maced by the jailer. Wilson had on only his shorts. Witnesses believe the jailer used a full can of Mace during this seven hour ordeal. Intermittently, the jailer would throw ice water on Wilson to exacerbate the pain and burn of the Mace.

APPENDIX E

IN THE DISTRICT COURT OF LEFLORE COUNTY,
STATE OF OKLAHOMA

DANIEL LEE WILSON

Plaintiff

v

No. CJ - 98 - 650

KENDALL BALLEW, Sheriff, of LeFlore County, Oklahoma, PAT BOZART, day jailer of the LeFlore County jail, and, ONE UNKNOWN OFFICER OF THE OKLAHOMA HIGHWAY PATROL, and BOARD OF COUNTY COMMISSIONERS, LeFlore County, Oklahoma,

FILED
DEC 17 1998
MELBA L. HALL, COURT CLERK
STATE OF OKLA. LEFLORE COUNTY
BY _____ DEPUTY

Defendants.

FIRST AMENDED PETITION

FIRST CAUSE OF ACTION

For his cause of actions against these defendants, plaintiff states:

I.

The defendant, KENDALL BALLEW, is and was at all times herein material the duly elected, qualified, and acting Sheriff of LeFlore County, State of Oklahoma.

II.

The defendant, PAT BOZART, is and was at all times herein material the.....

APPENDIX E-2

IN THE DISTRICT COURT OF LEFLORE COUNTY,
STATE OF OKLAHOMA

DANIEL LEE WILSON

Plaintiff

v

No. CJ - 98 - 679

KENDALL BALLEW, Sheriff,
of LeFlore County, Oklahoma,
JIM SHINAULT, night jailer of the
LeFlore County jail, and, four unknown
policemen, and BOARD OF COUNTY
COMMISSIONERS, LeFlore County,
Oklahoma,

FILED
DEC 17 1998
MELBA L. HALL, COURT CLERK
STATE OF OKLA. LEFLORE COUNTY
BY _____ DEPUTY

Defendants.

FIRST AMENDED PETITION

FIRST CAUSE OF ACTION

For his cause of actions against these defendants, plaintiff states:

I.

The defendant, Kendall Ballew, is and was at all times herein material the duly elected, qualified, and acting Sheriff of LeFlore County, State of Oklahoma.

II.

The defendant, Jim Shinault, is and was at all times herein material the duly appointed night jailer of the LeFlore County Jail, and was at all times acting as such...

APPENDIX E-3

IN THE DISTRICT COURT OF LEFLORE COUNTY,
STATE OF OKLAHOMA

DENNIS HOFFMAN

Plaintiff

v

No. CJ - 98 - 616

FILED
MAY 12 1998
MELBA L. HALL, COURT CLERK
STATE OF OKLA. LEFLORE COUNTY
BY _____ DEPUTY

KENDALL BALLEW, Sheriff, of LeFlore county; HENRY WELLS and RICHARD ENTMEIRER, duly appointed and acting deputy sheriffs of LeFlore county; TOMMY CALDWELL, a reserve officer for the LeFlore County Sheriff Office; SIX OTHER UNKNOWN AND UNNAMED DEPUTIES of the LeFlore County Sheriff Office and PAT BOZARTH, day jailer of the LeFlore county jail.

Defendants.

PETITION

For his cause of actions against these defendants, plaintiff states:

1.) The defendant KENDALL BALLEW is and was at all times herein material the duly elected, qualified and acting sheriff of LeFlore County, State of Oklahoma.

2.) The defendants HENRY WELLS and RICK ENTMEIRER were at all times herein material duly appointed and acting deputy sheriffs of LeFlore County.

3.) The defendant TOMMY CALDWELL was at all times herein material a duly appointed reserve officer of the LeFlore County Sheriff's.

FILED
JUL 14 1999
OFFICE OF

No. 98-2003

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

DENNIS HOFFMAN and DANIEL LEE WILSON
Petitioners,

vs.

KENDALL BALLEW, sheriff of LeFlore County; HENRY WELLS and RICHARD ENTMEIRER, duly appointed and acting deputy sheriffs of LeFlore County; TOMMY CALDWELL, a reserve officer of LeFlore County sheriff's office; PAT BOZARTH, day jailer of LeFlore County jail; JIM SHINAULT, night jailer of LeFlore County jail; and BOARD OF COUNTY COMMISSIONERS, LeFlore County, Oklahoma
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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BRIEF IN OPPOSITION OF PARTIES IN INTEREST, DEFENDANTS IN UNDERLYING LAWSUITS

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250

QUESTIONS PRESENTED

In their Petition for a Writ of Certiorari, Petitioners, Plaintiffs in the underlying lawsuits (hereinafter "Plaintiffs"), in essence, state that the question presented in this appeal concerns the application of the Fourteenth Amendment to the disqualification of a state district judge. Additionally, Plaintiffs are seeking review of a decision of the Oklahoma Supreme Court. However, these two facts are incongruent. Based upon the underlying lawsuit and Plaintiffs' appeal to the Oklahoma Supreme Court, the question to be presented is simply whether District Judge George H. McBee of LeFlore County, Oklahoma, should be disqualified from the underlying lawsuit. As such, the question presented to the Court involves a question of purely state law and is improper for this Court's consideration.

PARTIES TO THE APPEAL

The parties in the appeal to the Oklahoma Supreme Court are as follows:

Petitioners: Dennis Hoffman and Daniel Lee Wilson

Respondent: The Hon. George H. McBee
District Judge, LeFlore County,
Oklahoma

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Sup. Ct. R. 14 (1) (f) ix

Sup. Ct. R. 10 2,3

JURISDICTION

Plaintiffs contend that jurisdiction is sought pursuant to 28 U.S.C. 1257 (a). Section 1257 (a) provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Plaintiffs do not question a treaty or statute of the United States, nor do Plaintiffs question the validity of a State statute. Rather, Plaintiffs attempt to establish jurisdiction by interjecting the Fourteenth Amendment into an issue relating to state

law. As more fully discussed in Respondents', Defendants to the underlying action (hereinafter "Respondents"), Argument, Plaintiffs may not properly invoke this Court's jurisdiction based upon the underlying lawsuits and appeal to the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISIONS

There are no "constitutional provisions, treaties, statutes, ordinances [or] regulations which the case involves." Sup. Ct. R. 14 (1) (f).

STATEMENT OF THE CASE

Plaintiffs filed an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus in the Oklahoma Supreme Court to challenge LeFlore County District Court Judge McBee's denial of Petitioners' Motion to Disqualify in Hoffman v. Ballew, et al., District Court of LeFlore County, Oklahoma, Case No. CJ-98-616; Wilson v. Ballew, et al., District Court of LeFlore County, Oklahoma, Case No. CJ-98-650; and Wilson v. Ballew, et al., District Court of LeFlore County, Oklahoma, Case No. CJ-98-679. Plaintiffs alleged that District Judge George H. McBee should be disqualified from hearing their causes because he is, generally speaking, an interested party. The Oklahoma Supreme Court denied Plaintiffs' Petition for Writ of Mandamus.

ARGUMENT

Plaintiffs' entire theory upon which disqualification is sought centers around Okla. Stat. tit. 57, §§ 47, 48, 49, 51 and 55. (See Appendix "C," Plaintiffs' Petition for a Writ of Certiorari). No constitutional questions have been presented. Additionally, no final judgment has been rendered in the underlying cases. In any event, the statutory provisions relied upon by Plaintiffs are insufficient to establish that LeFlore County District Judge McBee has an interest in the subject matter. Moreover, no evidence has been presented to show bias or prejudice on the part of the Judge.

PROPOSITION I

NO CONSTITUTIONAL QUESTION HAS BEEN PRESENTED

Rule 10 of the United States Supreme Court Rules provides three situations in which a petition for writ of certiorari will be granted. The first situation, (a), is clearly inapplicable because a United States court of appeals has not rendered a decision in this case. The other situations are also inapplicable due to the fact that no important federal questions

have been decided (although, the three situations listed in Rule 10 "neither control[ ] nor fully measur[e] the Court's discretion." Sup. Ct. R. 10.

The United States Supreme Court has had occasion to address situations in which review is sought of a state court decision. In Braxton v. U.S., 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), the Court stated the main purpose for using certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." The Court in Leavitt v. Jane L., 116 S. Ct. 2068, 2072, 135 L. Ed. 2d 443 (1996), stated, "we do not ordinarily grant petitions for certiorari solely to review what purports to be an application of state law." The Court in Leavitt further suggested that petitions for certiorari should be granted "where the alternative is allowing blatant federal-court nullification of state law." Leavitt at 2072. This Court has set forth specific requirements for reviewing state court judgments when no federal court has been involved. Such review may only be entertained when the

state court bases its decision on federal law. Illinois v. Rodriguez, 497 U.S. 177, 182, 110 S. Ct. 2793, 2798, 111 L. Ed. 2d 148 (1990). Even still, the decision must have been dependent on federal law and not independently supported by state law:

> In Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553, 115 L. Ed. 2d 640 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." . . . We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.

Lambrix v. Singletary, 117 S. Ct. 1517, 1522 (1997) (citing Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S. Ct. 459, 462-64, 89 L. Ed. 2d 789 (1945)). This rule requiring a decision dependent upon a federal question "applies whether the state

law ground is substantive or procedural." Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640 (1991).

The Supreme Court's justification for not reviewing decisions of state law have also been expressed in the opinions addressing certiorari review. In Michigan v. Long, 463 U.S. 1032, 1039, 103 S. Ct. 3469, 3475, 77 L. Ed. 2d 1201 (1983), the Court reasoned, "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar." Further, the Court in Schad v. Arizona, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499, 115 L. Ed. 2d 555 (1991), referred to the "fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a state's courts." Neither the principles behind certiorari review, nor the applicable rules that govern the Supreme Court's appellate jurisdiction provide support for Plaintiffs' position.

Plaintiffs' sole justification for invoking the jurisdiction of the Court is premised upon the contours of the Fourteenth

Amendment. Indeed, the Court has indicated that a judge's refusal to disqualify may violate the Due Process Clause of the Fourteenth Amendment. Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997). However, the Fourteenth Amendment requires a "'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id., citing Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). Furthermore, of particular importance to the present matter, the Court in Bracy noted:

> Of course, most questions concerning a judge's qualifications to hear a case are **not** constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828, 106 S. Ct. 1580, 1588-1589, 89 L. Ed. 2d 823 (1986). Instead, these questions are, in most cases, answered by **common law, statute, or the professional standards of the bench and bar**.

Id., 520 U.S. at 904, 117 S. Ct. at 1797. (Emphasis added).

In the present case, no federal question has been presented. In fact, the only constitutional reference made by Plaintiffs in their Brief in Support of Petition for Writ of Mandamus to the Oklahoma Supreme Court was unsupported by fact or by law. Plaintiffs' argument in support of Judge McBee's disqualification was premised upon provisions of Oklahoma Statutes. Furthermore, Plaintiffs' rights under the Fourteenth Amendment have not been violated due to the fact that no final judgment has been entered in the underlying case. See generally Pittsburgh v. Simmons, 729 F. 2d 953, 954 (3rd Cir. 1984) (citing Green v. Murphy, 259 F. 2d 591, 594 (3rd Cir. 1958)(en banc)) (A judge's refusal to recuse is only reviewable after final judgment).

PROPOSITION II

THERE ARE NO FACTS OR AUTHORITY WHICH WOULD DICTATE LEFLORE COUNTY DISTRICT JUDGE MCBEE'S DISQUALIFICATION

Plaintiffs argue that certain statutory provisions regarding county jails operate to create an interest in lawsuits

against county jails on the part of a district judge. Plaintiffs even go so far as to suggest that the statutory provisions heighten a district judge's role in government to that of the executive branch. Plaintiffs' arguments are without merit and fail to support their claim under the applicable standards concerning disqualification.

A trial court's decision not to disqualify a judge will only be reversed upon evidence of a "clear abuse of discretion." Graham v. Graham, 434 P. 2d 245, 246 (Okla. 1967); See also T.R.M. v. State, 596 P. 2d 902, 905 (Okla. Crim. App. 1979) (citing Lemmon v. State, 538 P. 2d 596 (Okla. Crim. App. 1975). Indeed, the decision is "addressed to the trial court's sound discretion." Lemmon, at 601.

Courts have required judges to carefully consider whether or not to disqualify in a proceeding. In Johnson v. Board of Governors of Registered Dentists of State of Okla., 913 P. 2d 1339, 1348 (Okla. 1996), the court stated, "[w]hen circumstances and conditions surrounding litigation are of such a nature that they might cast doubt and question as to the

impartiality of any judgment the trial judge may pronounce, said judge should certify his disqualification." This standard is further addressed in the Code of Judicial Conduct, Canon 3 (E), Okla. Stat. tit. 5, Ch. 1, App. 4, which provides:

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> (c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject

> matter in controversy or has an interest more than de minimis that could be substantially affected by the proceeding;
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;
>
> (I) is a party to the proceeding, or an officer, director or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have an interest more than de minimis that could be substantially affected by the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

However, an application to disqualify a judge cannot be supported by mere conclusions and statements of opinion. Dowell v. Hall, 185 P. 2d 232, 235 (Okla. Crim. App. 1947) (citing Pruitt v. State, 70 P. 2d 130 (Okla. Crim. App. 1937); see also T.R.M. v. State, 596 P. 2d 902, 905 (Okla. Crim. App. 1979).

Plaintiffs claim that Okla. Stat. tit. 57, §§ 47, 48, 49, 51

and 55 create varying responsibilities upon a district judge over county jails. Specifically, Plaintiffs allege that §§ 47 and 51 create responsibilities upon a district judge to promulgate rules and regulations for county jails. Additionally, Plaintiffs allege that § 49 creates an appearance of impartiality due to the fact that a district judge may request copies of the jail register, as established by § 48. Plaintiffs allege that § 51 creates a responsibility upon a district judge to order that repairs be made to the county jail. Furthermore, pursuant to § 51, the district judge may request a written report concerning the appointment and payment of wages to a jail medical officer. Thus, as they have presented causes of actions regarding the use of mace and a "stand-up cell" in the LeFlore County Jail, Plaintiffs assert that Judge McBee should be disqualifying due to the fact that, through the alleged "responsibilities" placed upon him by the cited statutes, his actions, or failure to take action, have contributed to their alleged injuries.

Plaintiffs' interpretations of the cited statutes are without support and nonsensical. Pursuant to Okla. Stat. tit.

57, §47, the sheriff is in charge of the county jail. Additionally, section 513 of Title 19, Oklahoma Statutes, provides:

> The sheriff shall have the charge and custody of the jail of his county, and all the prisoners in the same, and shall keep such jail himself, or by his deputy or jailer, for whose acts he and his sureties shall be liable.

On the other hand, a district judge has supervision over his respective district court. Okla. Stat. tit. 20, § 120. The statutes outlining the respective duties of a sheriff and district judge, as well as the operation and supervision of county jails, are void of any responsibility of a district judge as to the actions of deputies and jailers, or for the operation of the county jail. In fact, section 192 of Title 74, Oklahoma Statutes, provides that the State Department of Health shall inspect the jails and ensure compliance with the applicable standards.

The relationship between a district judge and the county jail is too tenuous to support Plaintiffs' Application. The mere fact that a district judge possesses the authority to create rules and regulations of county jails, request copies of the jail

register, require repairs to be made to county jails or request written reports concerning the jail medical officer is hardly enough to question Judge McBee's partiality concerning Plaintiffs' lawsuits. In any event, Plaintiffs have failed to present any evidence that Judge McBee has promulgated rules or regulations concerning the use of mace or the "stand-up cell" in the LeFlore County Jail, or that he is otherwise involved in the operation of the jail that would require his disqualification in the underlying lawsuits pursuant to the applicable authority.

CONCLUSION

No federal question has been presented which would support the Court's review of this matter. Even assuming, arguendo, the Court had jurisdiction, Plaintiffs' claim is wholly without merit. Therefore, the real parties in interest, Defendants in the underlying lawsuits, request the Court deny Plaintiffs' Petition for a Writ of Certiorari.

Dated: July 13, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, admitted to practice before the Supreme Court of the United States October 13, 1998, hereby certifies that on July 13, 1999, three copies of the foregoing Brief in Opposition were served, by certified mail, postage prepaid, to the following:

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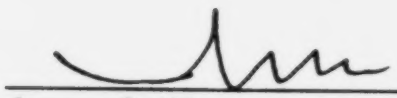

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